

Office of the Attorney General
Washington, D. C. 20530

July 29, 1983

MEMORANDUM FOR: Members of the Cabinet Council
on Legal Policy

FROM: William French Smith
Attorney General *WFS*

SUBJECT: Regulatory Reform and Legislative Veto

On June 23, 1983, the Supreme Court issued its decision in INS v. Chadha, striking down as unconstitutional the legislative veto provision found in the Immigration and Nationality Act. Notwithstanding the narrow issue presented, Chief Justice Burger's opinion for the Court was written broadly, striking down the legislative veto concept across the board as an infringement of the President's power to control the actions of the Executive Branch and to participate (by approving or vetoing) actions of Congress that affect the legal rights or duties of Executive Branch officials or private persons.

Since the Supreme Court's decision in Chadha, the Department of Justice has been working closely with other Executive agencies (particularly the Counsel to the President, the Office of Management and Budget, and the State and Defense Departments) to ensure an appropriate and measured response to that decision. (See the attached memorandum for a fuller discussion.) The executive branch has been careful to avoid providing any excuse for ill-considered congressional reaction to the Chadha decision. In addition, the government has stressed the importance of defending, both before Congress and in court, the validity of the remaining provisions of statutes that contained legislative veto provisions.

We have been fortunate that the reaction in Congress to Chadha has been a responsible one. While some members of Congress have indicated their desire to institute radical new forms of congressional review of executive action, most members appear inclined to defer major action until Congress and the executive branch have had more experience with congressional review in the absence of the legislative veto mechanism. Thus, while Congress may well ultimately enact some new form of oversight mechanism, it appears in the short term that Congress will do nothing, unless it appears that the executive branch is attempting a broad reading of Chadha. A group under the leadership of the Cabinet

Council on Legal Policy will be established to examine these long range considerations.

Because Chadha invalidated one of the most common mechanisms for congressional review of administrative action, the future of regulatory reform proposals in the aftermath of Chadha is somewhat uncertain. Nonetheless, it may be appropriate now that Chadha has resolved the question of the constitutionality of the legislative veto to give greater attention to substantially different forms of regulatory reform legislation than the comprehensive regulatory reform package (which contained a sweeping legislative veto provision) that was before Congress last year. In particular, the Administration might wish to give consideration to various "fast track" regulatory reform proposals that would reform the House and Senate rules to insure expedited consideration of legislative initiatives that the President designates as important to achieve policies of deregulation.

The President's Task Force on Regulatory Relief has been considering one such proposal. The draft legislation would authorize the President to submit to Congress "such reports as he deems appropriate" dealing with matters of regulatory reform, including regulatory programs he believes should be modified or repealed. Congressional action on such reports and any proposed legislation contained therein would be expedited in a number of ways under the proposal. For instance, each committee considering a report submitted by the President would have a limited amount of time in which to act upon the report, or be discharged from further consideration of it. Also, once a bill implementing any report had been placed on the calendar of the House of Representatives or the Senate, it would be in order to move to proceed to consider such a bill, and such motion "shall be highly privileged and shall not be debatable." In a number of other ways, the rules of the House and Senate would be amended to require expedited consideration of a bill implementing a Presidential report on regulatory reform. The ultimate aim would be to prevent such a bill from simply dying in Congress as a result of inertia or inaction.



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MEMORANDUM FOR THE CABINET COUNCIL ON LEGAL POLICY

This memorandum presents a summary analysis of the recent Supreme Court decisions regarding legislative vetoes and their potential impact on existing statutes and other sources of presidential authority.

Legislative vetoes are provisions pursuant to which Congress, or a unit of Congress, is purportedly authorized to adopt a resolution that will impose on the Executive Branch (or the "independent" agencies) a specific requirement to take or refrain from taking an action. The key characteristic of all legislative veto provisions is that a resolution pursuant to such a provision is not presented to the President for his approval or veto.

2. The Supreme Court Decisions

Justice Powell found that Congress had invaded judicial powers and concurred in the Court's decision. Thus, only Justice White actually rejected the analysis in the Chief Justice's opinion.

The Chief Justice rested his broadly written opinion on the requirement of the Presentment Clauses of the Constitution that laws be made by enactment in each House of Congress and the concurrence of the President (or by a two-thirds vote of both Houses of Congress overriding a presidential veto). The Court found these provisions to be "integral parts of the constitutional design for the separation of powers."

It is significant, perhaps more so in a larger sense than presented in Chadha, that the Court expressly found "beyond doubt" that "lawmaking was a power to be shared by both Houses and the President" and declared that the "Presentment Clauses serve the important purpose of assuring that a 'national' perspective is grafted on the legislative process." The Court expressly reaffirmed an earlier statement that the "'President is a representative of the people just as the members of the Senate and House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide.'" The Court also emphasized the bicameralism requirement of Article I and its extreme importance to the Framers.

The key to the Court's conclusion is that it found that the "veto" of Mr. Chadha's suspension of deportation was legislative in nature because it had the "purpose and effect of altering the legal rights, duties and relations of persons, including . . . Executive Branch officials . . . outside the legislative branch." As such it "involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked."

The Court brushed aside claims that the legislative veto mechanism was a "useful 'political invention,'" a "convenient shortcut" or an "appealing" and "efficient"

"compromise" for the sharing of legislative power with the Executive:

"The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked."

On July 6 the Supreme Court summarily affirmed two D.C. Circuit Court decisions in which one- and two-House vetoes of rules issued by independent regulatory commissions had been held unconstitutional. 1/

The aggregate effect of these three decisions is that 12 circuit court judges in two separate circuits and six Supreme Court Justices have found legislative vetoes unconstitutional in their one- and two-House manifestations for "executive" and "rule-making" actions and with respect to vetoes of Executive Branch and "independent" regulatory body actions. Only one member of the judiciary in these three cases, Justice White, disagreed on the constitutional issue. There remains no reasonable room to argue that legislative vetoes in any form or context heretofore contemplated are constitutional. Justice Powell, in his concurring opinion in Chadha, said that the decision will "apparently invalidate every use of the legislative veto." Justice White in dissent, declared that the decision "sounds the death knell for 200 other statutory provisions"

These decisions vindicate the positions regarding legislative vetoes of every President since Hoover, and many Attorneys General, including Attorney General William Mitchell, who in 1933 urged President Hoover to veto a bill, stating "[e]ach President has felt it his duty to pass the executive authority on to his successor unimpaired by the adoption of dangerous precedents. . . . The proviso in this . . . bill may not be important in itself but the principle at stake is vital."

1/ Process Gas Consumers Group v. Consumers Energy Council of America, Nos. 81-2008 et al.

3. Public and Legislative Branch Reaction

Most journalists and commentators initially portrayed these decisions as major and unmitigated "victories" for the presidency. Commentators from the Congress did not disagree regarding the Court's death knell for legislative vetoes, but some commented that power heretofore so generously delegated to the Executive and independent agencies would be sharply narrowed and authority previously enjoyed by the President would be withdrawn.

Some proposals were introduced in the House of Representatives to reduce the power of the Consumer Product Safety Commission (CPSC) in the aftermath of Chadha by requiring affirmative congressional approval of all rules issued by the CPSC by a law before such rules could take effect. However, unless the Executive Branch provokes a confrontation with the Legislature through ill-considered and highly controversial actions or statements, congressional reaction on a broad gauge, i.e., to withdraw legislatively all delegated authority to which a legislative veto is attached, is not likely to develop widespread support. A sweeping and somewhat radical proposal was actually advanced by Mr. Stanley Brand, General Counsel to the Clerk of the House of Representatives, in his testimony before the House Committee on Foreign Affairs on June 19, 1983. His proposal met with a very icy reception by Chairman Zablocki and did not appear to receive any support from other members of that Committee. In addition, Deputy Attorney General Schmults testified before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary on July 18 and the House Committee on Foreign Affairs on June 20 (accompanied by Deputy Secretary of State Dam), and the overall reaction of those committees appeared to be a go-slow, cooperative one. Mr. Dam will testify before the Senate Committee on Foreign Relations on July 29 once again on the import of Chadha in the foreign relations area.

4. Legislation and Presidential Authority Affected

The Office of Legal Counsel has determined that 126 public laws containing 207 separate legislative veto devices will be affected by Chadha.

Some of the most significant and/or controversial provisions are:

1. War Powers Resolution, 50 U.S.C. § 1544 (removal of armed forces engaged in foreign hostilities may be required by concurrent resolution);
2. International Security Assistance and Arms Control Act, 22 U.S.C. § 2776(b) (concurrent resolution may halt certain proposed arms sales);
3. National Emergencies Act, 50 U.S.C. § 1622 (concurrent resolution may terminate declaration of national emergency under International Emergency Economic Powers Act [IEEPA - used in Iran situation]);
4. International Security Assistance Act of 1977, 22 U.S.C. § 2753(d)(2) (Supp III 1979) (concurrent resolution disapproving defense equipment transfers);
5. Nuclear Non-Proliferation Act of 1978, 42 U.S.C. §§ 2160(f), 2155(b), 2157(b), 2153(d) (Supp III 1979) (disapproval by concurrent resolution of exports of nuclear material and technology);
6. Congressional Budget and Impoundment Control Act of 1974, 31 U.S.C. § 1403 (one House veto of spending deferrals);
7. Trade Act provisions. Various provisions regarding duties, quotas, waivers (concurrent disapproval provisions);
8. Energy provisions. Various provisions granting presidential emergency powers (one- or two-House disapproval provisions);
9. Federal Election Campaign Act Amendments of 1979, 2 U.S.C. § 438(d)(2) (Supp III 1979) (one House veto of Federal Election Commission rules);
10. Various Reorganization Acts;
11. Federal Pay Comparability Act;

12. District of Columbia legislation;

13. Interior Department actions such as off-shore leasing and wilderness designations.

5. Severability

In Chadha, the Chief Justice's opinion appears to have adopted a very strong presumption that legislative veto devices will be stricken by the courts while leaving intact the remainder of the statutory schemes in which these devices were inserted by Congress. That strong presumption was reinforced by the Court's summary affirmance on July 6 of the D.C. Circuit's decision in the natural gas phase II pricing rule case, CECA v. FERC, 673 F.2d 425 (D.C. Cir. 1982). The statute involved in FERC, in contrast to the statute involved in Chadha, did not contain a "severability clause," and its legislative history permitted the House and Senate and a number of intervenors to argue that the legislative veto device was inseverable. As Deputy Attorney General Schmults stated in his testimony on July 18 regarding the significance of the Court's summary affirmance in FERC, "if the Court had wanted to reverse the apparent trend toward 'severability' in the recent cases decided by the D.C. Circuit, it presumably would have used that case as a vehicle to do so."

In Congress, the attitude on the severability issue, at least so far, seems to be one of acceptance of the high likelihood that very few, if any, grants of power to the Executive will be held to fall with the legislative veto devices attached to them. Mr. Brand, in his testimony before House Foreign Affairs, stated his view that "absent an overwhelming record to support [inseverability], I believe the courts will find severability in many cases." The conclusion that Mr. Brand drew from this reality -- "that Congress is better served by wholesale repeal of the delegations effected by these statutes" -- was not well received by the House Foreign Affairs Committee.

In court, the Department of Justice is presently preparing to argue the severability of legislative veto devices in litigation ranging from an attempt by the Exxon Corp. to have set aside a \$1.6 billion judgment entered against it in June, 1983, to a suit brought by federal employee unions arguing that the President's power to place in effect an "alternative"

pay plan is inseverable from the one-House veto device attached to that presidential power and seeking substantial back pay based on that argument. All this litigation is being coordinated and supervised by the Civil Division of the Department of Justice.

6. Retroactivity

Some litigation may arise over the validity of past agency actions pursuant to authorities or power which are arguably void because inseverably connected with legislative vetoes. For example, Merrill Lynch is currently arguing that the EEOC's enforcement action against them cannot be maintained because the EEOC acquired its enforcement power pursuant to a reorganization plan that was issued under a statute containing an inseverable one-House veto device. These issues will have to be evaluated as they arise, but it is not likely that the courts will overturn whole regulatory schemes or administrative actions which have created vested rights.

7. Report and Wait Provisions

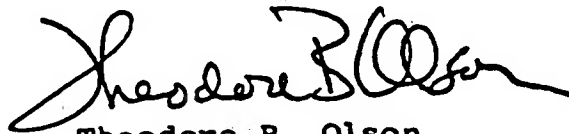
The Chadha decision stands for the proposition generally that statutes which require actions to be reported to Congress and remain in suspension for a certain period to allow a legislative response will be upheld. We have assured Congress in testimony discussed above that the Executive will scrupulously observe such requirements. However, unless Congress acts through substantive legislation, most actions will become effective at the end of the waiting period.

8. Other Developments

The Office of Management and Budget has circulated in draft form and expects to issue in the very near future a bulletin designed to ensure close coordination of all Executive Branch actions to be taken pursuant to statutes containing legislative veto devices. The information gathered in that process, as well as that maintained by the Civil Division regarding litigation, should keep us fully abreast of important developments.

A working group of White House, OMB, Justice, State and Defense officials has monitored developments within and without the Administration since the Chadha decision and has made recommendations where appropriate.

A long range planning group will be organized under the Cabinet Council on Legal Policy to consider long term responses to Chadha including reexamination of the role of "independent" agencies, the delegation doctrine pursuant to which rule-making authority is transferred to agencies, and proposals for "fast-track" legislative review of administrative actions and authorities.

A handwritten signature in black ink, appearing to read 'Theodore B. Olson', with a stylized, flowing script.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

98TH CONGRESS
1ST SESSION

S. J. RES. 135

Proposing an amendment to the Constitution of the United States for the establishment of a legislative veto.

IN THE SENATE OF THE UNITED STATES

JULY 27 (legislative day, JULY 25), 1983

Mr. DECONCINI introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States for the establishment of a legislative veto.

1 *Resolved by the Senate and House of Representatives of*
2 *the United States of America in Congress assembled, (two-*
3 *thirds of each House concurring therein), That the following*
4 article is proposed as an amendment to the Constitution of
5 the United States, which shall be valid to all intents and
6 purposes as part of the Constitution when ratified by the leg-
7 islatures of three-fourths of the several States within seven
8 years after the date of its submission by the Congress:

2

1 "ARTICLE —

2 "SECTION 1. Executive action under legislatively dele-
3 gated authority may be subject to the approval of one or both
4 Houses of Congress, without presentment to the President, if
5 the legislation that authorizes the executive action so
6 provides."

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